

COUNCIL POLICY

CURRENT

SUBJECT: HEARING PROCEDURES FOR PROTESTS OF CONTRACT SELECTION
OR NON-RESPONSIBILITY DESIGNATION
POLICY NO.: 000-29
EFFECTIVE DATE: July 30, 2002

BACKGROUND:

The City's primary objective when awarding Contracts is to use fair and unbiased selection procedures.

PURPOSE:

This policy establishes standardized hearing procedures to resolve protests of Contract Selection or designation of Bidders as Non-Responsible.

DEFINITIONS:

Award - means the acceptance of a bid or proposal by the City's authorized representative.

Bidder - means a Person who has submitted a bid, proposal, or other document seeking award of a contract.

City Manager - means the City Manager, Assistant City Manager, Deputy City Manager, or any public officer designated by the City Manager.

Consultant - includes providers of expert or professional services and excludes providers of Services.

Contract - means any Purchasing Contract, Public Works Contract or Consultant agreement to which the City is a party.

Contract Selection - means the City's selection of a Bidder to be awarded a Contract.

Contract for Goods - means an agreement between the City and another party in which the City is the purchaser of articles, commodities, materials, supplies, equipment, or insurance.

Contract for Services - means an agreement between the City and another party in which the City is the purchaser of Services, excluding Consultant services. Maintenance contracts are Contracts for Services.

Evaluation Team - means the City team (consisting of one or more members) assembled to review and evaluate bids and proposals.

Goods - means any articles, commodities, materials, supplies, equipment, or insurance.

Interested Parties - means the Bidder selected for Award of a Contract, and any non-selected Bidder.

Non-Responsible - means a determination by the City that a Bidder does not have the quality, fitness, and capacity to satisfactorily perform the work proposed in a Public Works Contract.

Person - has the same meaning as that in San Diego Municipal Code section 11.0210.

Protest Hearing Board (Board) - means a panel appointed by the City Manager as needed to review evidence presented by all Interested Parties to determine whether the Evaluation Team's Contract Selection is in accordance with all applicable laws and guidelines.

Public Works Contract - means an agreement for the construction, reconstruction, or repair of public buildings, streets, utilities, and other public works.

Purchasing Contract - includes contracts for Goods and Contracts for Services.

Requests for Bids (RFB) - means a City document that is advertised in the official City newspaper when required by law that contains contract provisions, specifications and procedures, and invites proposals.

Requests for Proposals (RFP) - means the City document that is advertised in the official City newspaper when required by law that contains contract provisions, specifications and procedures, and that invites proposals.

Services - means all work provided by persons other than Consultants, including work provided pursuant to maintenance contracts, but excluding the construction, reconstruction, or repair of public buildings, streets, utilities, or any other public works. Providing Goods does not constitute Services.

POLICY:

It is the policy of the City Council that a protest of the selection of a Bidder to be awarded a City Contract be heard by an objective body. To facilitate an objective forum, this policy establishes an administrative procedure to resolve such protests.

POLICY APPLICABILITY:

This policy applies to all Contracts procured by RFB or RFP, except that it does not apply to (1) contracts with other public agencies; (2) contracts awarded by the City Council on a non-competitive basis; (3) contracts involving a transfer of an interest in real property including but not limited to a lease or a contract for sale; (4) contracts whose award is prescribed by a funding source, such as the state or federal government; (5) Contracts for an expenditure less than \$50,000; and (6) Consultant agreements for an expenditure less than \$25,000.

PROCEDURE:

1. Designation of Bidder as Non-Responsible: When the Evaluation Team has determined that a Bidder is Non-Responsible, the City Manager may elect to pursue debarment if the evidence that supports the Bidder's designation as Non-Responsible also supports debarment. In the event that the City Manager elects to debar the Bidder, the City Manager shall follow the

notice and hearing procedures for debarment set forth in San Diego Municipal Code section 22.0801 *et seq.* In all other cases where the Evaluation Team has determined that a Bidder is Non-Responsible, the City Manager will follow the notice and hearing procedures set forth in this policy.

2. Notice of Designation of Bidder as Non-Responsible: The City shall provide written notice of the City's designation of a Bidder as Non-Responsible. The notice shall be made pursuant to San Diego Municipal Code section 22.0806. The failure of any Bidder to receive properly served notice shall not affect the validity of the protest. The notice will state the following:
 - A. The City's designation of the Bidder as Non-Responsible;
 - B. A summary of the factual basis upon which the Evaluation Team has determined that the Bidder is Non-Responsible; and
 - C. That the Bidder will have an opportunity to protest the designation of Non-Responsibility if the Bidder submits a written request for such a hearing within ten calendar days of the date of the notice. If the tenth calendar day falls on a week-end or City holiday, the protesting bidder may submit the protest on the first work day following such week-end or holiday.
3. Notice of Successful Bidder or Proposer: Following review of all submitted Bids or Proposals, the City shall announce the selected Bidder. The method of public announcement shall be disclosed in the RFB or RFP. All protests of the successful Bidder shall be submitted in writing within ten calendar days from the date of the announcement of the selected Bidder. If the tenth calendar day falls on a week-end or City holiday, the protesting Bidder may submit the protest on the first work day following such week-end or holiday. The written protest shall be submitted to the City department to whom the bids or proposals were submitted.
4. Grounds for Protest: Protests shall clearly state in detail the factual basis for the protest and include all supporting information. Protests shall be limited to the following: (1) The City failed to follow procedures or requirements specified in the RFB or RFP, including any amendments; (2) City employees or Evaluation Team members engaged in misconduct or impropriety; (3) the City's designation of the protesting bidder as non-Responsible was incorrect. A protesting Bidder will not be entitled to a hearing to protest a bidder's *Responsiveness*, however, the City will allow a Bidder to submit materials concerning its own responsiveness. In the event that the City determines that a Bidder is non-responsive, the City will provide notice to the subject Bidder detailing the factual basis for such determination.
5. City Manager Review of Protest: The City Manager will review the protest to determine whether it is timely and satisfies the requirements of Paragraph 4. If the City Manager determines that the protest is either untimely or fails to satisfy the requirements of Paragraph 4, the City Manager will reject the protest and notify the protesting Bidder that no hearing will be held. If the City Manager finds that the protest satisfies the requirements of Paragraph 4, the City Manager will forward the protest to a Protest Hearing Board established pursuant to Paragraph 6 of this policy.

6. Appointment of Protest Hearing Board: For any Contract except a Consultant agreement, the City Manager shall appoint three individuals to serve on the Protest Hearing Board. These individuals shall be unbiased and may be City employees, but shall not be composed of City personnel who have participated in the subject Bidder selection or are subject to the authority, direction, or discretion of personnel who have participated in the Bidder selection. This standard may be accomplished by excluding division personnel as prospective Board members when that division has rejected the contract that is the subject of a bid protest hearing. The City Manager will designate one member as chairperson. For Consultant agreements, the Board will consist of at least five members. For this five-member Board, the City Manager will appoint two members of the public, including a representative of the Citizens' Equal Opportunity Commission, in addition to the three other members.
7. Notice of a Hearing: Upon the appointment of a Protest Hearing Board, the City Manager will set a date, time, and place for the protest hearing. Unless all parties agree to a hearing date with shorter notice, the Board will send written notice to the protesting Bidder not less than five working days before the hearing. The notice will disclose the date, time and place for the protest hearing. If a Bidder protests a determination of Non-Responsibility pursuant to a pre-qualification procedure, then the hearing will be held prior to closing time for receipt of Bids.
8. Presentation of Evidence: The Board will hear evidence and arguments from the Evaluation Team and Interested Parties, their witnesses or authorized representatives. Evidence may be oral or written, but any documents or written argument must be submitted to the Board no later than three working days prior to the hearing date. Any information or evidence submitted to the Board after the deadline may be excluded by the Board. The Hearing Board need not be bound by the common law or statutory rules of evidence and procedure, but may make inquiries in the matter through all means and in a manner best calculated to make a just factual determination. The hearing shall be open to the public.
9. Record of Hearing: All hearings shall be tape recorded by the City Manager, however, any Interested Party may request that a certified stenographer record the hearing proceedings in lieu of a tape recording. The requestor of the certified stenographer will bear all recording costs and must provide a complete copy of the hearing transcript to the Board without cost.
10. Decision: After review of all evidence and arguments presented, the Board will render a final determination by a majority vote. The Board's deliberations and consultation with its legal counsel shall be confidential. The Board will issue its decision on the protest as expeditiously as possible, but no later than thirty calendar days after the protest hearing. The Board will send written notification of the decision to all Interested Parties. Except for protests of Consultant agreements for an expenditure exceeding \$250,000 all Board decisions are final. Board decisions on protests of Consultant agreements for an expenditure exceeding \$250,000 may be appealed to the City Council. This appeal shall be submitted in writing to the City department where bids or proposals were submitted no later than ten calendar days after the date the Board issues its decision. The City department will forward the appeal to the City Council. Failure to submit a timely appeal shall bar consideration of an appeal.

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11. Decision Based Upon Evidence: The Hearing Board's decision shall be supported by findings which, in turn, shall be supported by the evidence presented at the hearing.
12. Burden and Standard of Proof: The protesting Bidder shall bear the burden of proof of the factual basis for the protest by a preponderance of the evidence.
13. Effects on Contracts: Failure of a City employee or department to comply with this Council Policy shall in no way affect the validity of any Contract entered into between the successful Bidder or Proposer and the City.

HISTORY:

Adopted by Resolution R-285123 12/12/1994

Amended by Resolution R-293208 05/30/2000

Amended by Resolution R-296879 07/30/2002